



California Fair Political Practices Commission

November 29, 1989

Charles H. Bell, Jr.
Nielsen, Merksamer, Hodgson,
Parrinello & Mueller
770 L Street, Suite 800
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-89-644

Dear Mr. Bell:

This is in response to your request for advice concerning the activities of the California Republican Party (the "Party") in upcoming special elections and its duties under the Political Reform Act (the "Act").¹

QUESTIONS

1. Are expenditures for direct communications by the Party to its members, when made at the behest of a candidate, subject to the Act's contribution limits?

2. What contribution limits apply to expenditures for Party communications that are made at the behest of a candidate but directed at both Party members and non-Party members?

3. May the Party, at the behest of a candidate, make expenditures in excess of the Act's contribution limits for the production and mailing of a slate card which endorses that candidate in the general election and is sent only to registered Republicans?

4. Are all California registered voters who state a Republican Party affiliation members of the Party for purposes of the Act's contribution limits?

5. Must the communications referred to in Questions 1, 2 and 3 above be entirely produced and paid by the Party?

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

6. Are expenditures by the Party for candidate-specific communications via the broadcast media and made at the behest of that candidate subject to the Act's contribution limits?

CONCLUSIONS

Questions 1, 2 and 3. Pursuant to the preliminary injunction filed on May 19, 1989 in the case of Service Employees International Union, et al. v. Fair Political Practices Commission, U.S. District Court, Eastern District of California, Case No. CIVS 89-0433 LKK-JFM, the Act's contribution limits do not apply to the Party's communications with its members, including communications by slate card, even if the Party's expenditures on the communications are made at the behest of candidates.² Where the Party makes an expenditure on a communication at the behest of a candidate and the communication is not directed exclusively to Party members, the expenditure is a contribution to that candidate and cannot exceed \$5,000 during a fiscal year (Section 85303(b)), \$5,000 during a special election cycle (Section 85305(c)(3)) or \$5,000 during a special runoff election cycle (Section 85305(c)(3)).

Question 4. For the purposes of the court order described in the answer to Questions 1, 2 and 3 above, all California registered voters who state a Republican Party affiliation are members of the Party.

Question 5. In order for a communication to be covered by the court order described in the answer to Questions 1, 2, and 3 above, it need not be entirely produced and paid by the Party. To the extent the communication is partly paid by a person in conjunction with the Party, it may constitute a contribution to the candidate by that person and be subject to the Act's contribution limits.

Question 6. For the purposes of the court order described in the answer to Questions 1, 2, and 3 above, Party expenditures for candidate-specific communications via broadcast media and made at the behest of that candidate are subject to the Act's contribution limits.

FACTS

The California Republican Party wishes to engage in communications with registered Republicans, including absentee ballot application mass mailings, candidate endorsement mass mailings,

² The Commission is considering the amendment of Regulation 18215 at its December 13, 1989 meeting. If adopted, this amendment will exempt expenditures for certain communications related to voter registration and get-out-the-vote drives from the definition of contribution. A copy of the proposed amendment to Regulation 18215 is enclosed.

volunteer recruitment mass mailings, telephone bank get-out-the-vote communications, and telephone voter identification calls to registered Republicans to target high probability voters who the Party believes will favor any Party-endorsed Republican candidate. Any or all of these communications with Party members may feature or urge the election of a specific candidate.

In its telephone communications, the Party would be communicating only with specific registered Republicans using a voter registration and telephone list. In its mass mailing communications, the communications would be addressed in two ways: (1) using computer labels to "The Smith Household" where all household registrants were registered Republicans and (2) using labels addressed to specific registered Republicans only in households that contain both registered Republicans and persons registered in other parties or decline-to-state. Neither the telephone calls nor the mass mailings would be addressed to persons other than registered Republicans.

The communications will be produced and paid for by the Party and will not merely be candidates' mass mailings with the Party's name and address on them. The Party will not use the broadcast media such as television, radio, or cable television.

These expenditures will be done "at the behest" of the endorsed Republican candidates and will feature or mention the candidates.

ANALYSIS

The Act imposes limits on contributions by political parties to candidates, both on a fiscal year basis (see Section 85303) and on an special and special runoff election basis (see Section 85305).

Section 82015, states that an expenditure made at the behest of a candidate is a contribution to that candidate.

Regulation 18225 states that an expenditure includes a monetary or nonmonetary payment by an official committee of a political party made to influence the action of voters for or against the election of a candidate. (See Regulation 18225(a)(1) and (a)(2).)

Regulation 18215(b) defines "made at the behest" as:

[A] payment made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, or at the request or suggestion of a candidate....

On the basis of those provisions, any expenditure made by the Party for the benefit of and in consultation with a candidate constitutes a contribution to that candidate. Under the facts you have presented, any of the expenditures the Party intends to make

in communicating with its members will be made after consultation with candidates who will benefit from them. Accordingly, the contribution limits of Section 85305 (and Section 85303, if an expenditure occurs outside a special or special runoff election cycle) apply.

However, on May 19, 1989 a preliminary injunction was filed in the case of Service Employees International Union, et al. v. Fair Political Practices Commission, U.S. District, Court Eastern District of California, Case No. CIVS 89-0433 LKK-JFM, which enjoined some of the Commission's enforcement duties under the Act (copy enclosed). Among the matters enjoined was the Commission's duty to enforce the contribution limits of Section 85301 of the Act to the extent these limits interfered with a membership organization's ability to communicate with its members. While the preliminary injunction technically applies only to the limits of Section 85301 and not those of Section 85303 (which apply to contributions by political parties), the Commission views political parties as membership organizations. Therefore, to avoid possible violation of the court order, the Commission views the preliminary injunction as extending to communications by political parties to their members. Until the order has been modified by the court, the Commission will not enforce the Act's contribution limits when these types of communications are made. Please note, however, that Party expenditures of this nature continue to be contributions for purposes of the reporting provisions of the Act. (See Sections 84100-84400.)

For the purposes of the preliminary injunction discussed above, it is necessary to define who is a "member" of a political party. Section 500 of the Elections Code requires that, when registering to vote, the registrant complete an affidavit on which he may state his political party affiliation. (Elections Code Section 500(h).) Section 501 of the Elections Code permits the registrant to decline to state a political party affiliation, but if he does so he is not permitted to vote the ballot of any party or for any delegates to the convention of any party. Since designation of party affiliation on the affidavit is necessary for participation in party ballot and delegate decisions, it seems that this can also be a logical indicator of party membership. Therefore, a person will be considered to be a member of a particular political party if he or she declares affiliation with that party on his or her current affidavit of voter registration.

You next ask whether expenditures for communications by the Party that are otherwise covered by the court order must be exclusively prepared and paid by the Party. We read no requirement for this in the court's order. If a membership organization, such as the Party, desires to share with another person the cost of its candidate-requested communication to its members, we see no restriction in the Party doing so, as long as the expenditure is properly allocated to those making it and reported. Of course, the person who is sharing the cost of the communication with the Party must recognize that its portion of the contribution to the candidate may by itself be subject to the Act's contribution limits.

Finally, you ask whether a Party expenditure for a communication otherwise permitted by the court order is permitted if the communication is made via the broadcast media. The court's order applies to communications which are directed only at the members of a union or membership organization such as the Party. By its nature, a communication by way of the broadcast media presumably will reach a much broader audience than just Party members. Consequently, absent evidence to the contrary, the Commission will presume that any communication sent by way of the broadcast media is directed at and reaches more than the members of a particular organization. Expenditures for these types of communications will thus not be subject to the exemption set forth in the court order.

At your request, we are mailing a copy of this letter to Lance H. Olson., attorney for the California Democratic Party. As you are aware, Mr. Olson recently requested advice from the Commission similar to that requested in your letter. We will provide you with a copy of our reply to Mr. Olson.

If you have any questions, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

By: Scott Hallabrin
Counsel, Legal Division

KED:SH:ld

Enclosures

LAW OFFICES OF
**NIELSEN, MERKSAMER, FERGUSON,
HODGSON, PARRINELLO & MUELLER**
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FILE NUMBER

November 8, 1989

5363.01

Ms. Kathryn E. Donovan
General Counsel
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Re: Formal Advice Request

Dear Kathy:

This formal advice request is submitted on behalf of the California Republican Party and its Treasurer.

We are aware of the formal advice request submitted to you on behalf of the California Democratic Party by its counsel Lance H. Olson, Esq. In his letter, he specifically requests advice on whether the Democratic Party may engage in certain activities in the pending special elections for state legislative offices in the 27th Assembly and 39th Senate Districts, including: (1) direct mail endorsement mailings; (2) mail, telephone and personal appeals for absentee ballot applications; and (3) mail, telephone and personal get-out-the-vote appeals.

The California Republican Party is similarly requesting clarification on these issues. However, we also request clarification of several related issues, specifically related to the permissibility of appeals to non-members.¹

The California Republican Party wishes to engage in a similar variety of communications with registered Republicans, including absentee ballot application mass mailings, candidate endorsement mass mailings, volunteer recruitment mass mailings, telephone bank get-out-the-vote communications, and telephone voter identification calls to registered Republican voters to target high probability voters who the Party believes will favor any Party-endorsed Republican candidate. Any or all of these

¹ The Olson letter specifically indicates that the Democratic Party's absentee and get-out-the-vote communications would be directed to its "members." However, it requests advice on whether direct mail endorsements may be sent to "recipients" (presumably non-members or so-called "potential members" as the term is used by the Democratic Party in its SEIU case pleadings).

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communications with Party members may feature or urge the election of a specific candidate.²

In its telephone communications, the Party would obviously be communicating only with specific registered Republicans using a voter registration/telephone list. In its mass mailing communications, the communications would be addressed in two ways: (1) using computer labels to "The Smith Household" where all household registrants were registered Republicans and (2) using labels addressed to specific registered Republicans only in households that contained both registered Republicans and persons registered in other parties or decline-to-state. Neither the telephone calls nor the mass mailings would be addressed to persons other than registered Republicans.

The communications will be the Party's own communications, i.e., produced and paid for by the Party and not just candidates' mass mailings with the Party's name and address on them.

The Party will not use the broadcast media such as television, radio, or cable television for such communications, because the scope of such communications would be much broader than just registered Republican voters.

Because these expenditures would be done "at the behest" of endorsed Republican candidates and as noted above will feature or mention the candidate, we assume the Party's communications would constitute reportable "non-monetary contributions" to candidates.³ Funds collected in compliance with Proposition 73 limits would be utilized for all, or any

² Assume for the purposes of your response that the Party has already made the maximum contribution of \$5,000 to each candidate for which endorsement communications would be made for the special primary election and would also make such a contribution for any special runoff election (Gov't Code § 85305).

³ This request assumes that the communications do not fall within the scope of the proposed amendment to Regulation 18215, which has been pre-noticed by the Commission for hearing at its December 13, 1989 meeting.

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portion of a communication that referenced a clearly-identified candidate.⁴

Questions Presented

We would appreciate the Commission's confirmation that:

1. (a) since the California Republican Party is a "membership organization", direct communications to its membership, which might be considered contributions to candidates under the Political Reform Act, are not subject to the contribution limits imposed by Proposition 73, pursuant to the court's preliminary injunction; and,

(b) all California registered voters stating a Republican Party affiliation are indeed "members" of the Republican Party for the purposes of the Political Reform Act.

2. The communications must actually be the Party's own communications, produced and paid for by the Party, not just candidate mailings with the Party's name and address on them.

3. (a) the Party may expend funds in excess of \$5,000 in the aggregate per candidate for such communications provided that the communications are targeted only to registered Republican voters in each district in connection with the special primary election, and in excess of \$5,000 in the special run-off election, if one is necessary; and,

(b) Communications to non-members that advocate the election or defeat of a candidate are subject to the applicable \$5,000 limits.

4. The \$5,000 per candidate per special election limit per candidate per election of Gov't Code § 85305 would apply to any candidate-specific communications via the broadcast media, inasmuch as such communications would not be specifically directed only to registered Republican voters but rather would be indiscriminately communicated to the general public.

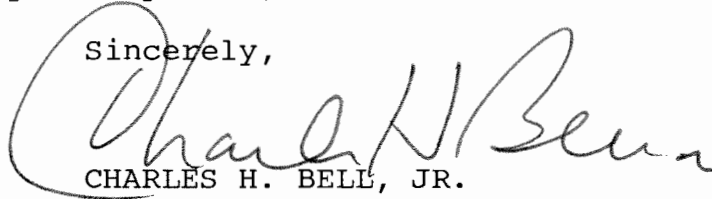
⁴ We assume that if a dual purpose mailing includes, e.g., an absentee ballot application segment (that does not contain any candidate endorsement) and a separate candidate endorsement segment, the former segment could be paid for using unlimited funds, while the latter must use limited funds only.

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The Party would also like confirmation that it could prepare and distribute to registered Republican voters only a slate card endorsing candidates in a general election, for amounts in excess of the limits in Gov't Code § 85303(b).

Because of the pendency of these special elections, and the necessity to plan for such communications in advance, we also request an expedited response. Because of the similar application to the two major parties, we would request either a jointly-addressed reply or separate, simultaneous letters.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charles H. Bell, Jr.", is written over the typed name. The signature is fluid and somewhat stylized, with the first name "Charles" being the most prominent part of the script.

CHARLES H. BELL, JR.

CHB:ss

cc: Chairman Larson
Commissioners
Scott Hallabrin, Counsel
Lance H. Olson, Esq.



California Fair Political Practices Commission

November 13, 1989

Charles H. Bell
Nielsen, Merksamer, Hodgson,
Parrinello & Mueller
770 L Street, Suite 800
Sacramento, CA 95814

Re: Letter No. 89-644

Dear Mr. Bell:

Your letter requesting advice under the Political Reform Act was received on November 9, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Scott Hallabrin an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan
General Counsel

KED:plh